IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
:::
ORDER

S.B. Civil Writ Petition No.2528/2003-Jalam Singh & Ors. Vs. State of Rajasthan & Anr.

UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA.

Date Of Order :: 20th November, 2006

PRESENT

REPORTABLE

Hon'ble Mr. Justice Mohammad Rafiq

Mr. Sangeet Lodha, Advocate, counsel for the petitioners.
Mr. R. Dave, Dy. Government Advocate, for the respondents.

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This writ petition has been filed by as many as 23 petitioners who are all working on the post of Assistant Engineer with Public Works Department of the State Government with the prayer that respondents be directed to consider them as holders on the post of Asstt. Engineer in substantive capacity with effect from 16th Nov., 1988 by treating them to have been selected against the vacancies of the year 1988-89 and accordingly reckon their seniority.

Foundational facts as set out in the pleadings are that the petitioners were initially appointed as Junior Enigneer in the service of the respondents. They were later promoted on the post of Asstt. Engineer (Civil) (Degree holder) by different orders of the respondents on urgent temporary basis in ad hoc capacity under Rule 27 of the Rajasthan Service of Engineers (B&R Branch) Rules, 1954 (in short the Rules of 1954). The petitioners are since then continuously holding the post of Asstt. Engineer. Subsequently, the respondents by orders dated 3.11.92, two orders dt. 8.6.1994 and order dated 20.6.1994 promoted all the petitioners on regular basis on the post of Asstt. Engineer on the recommendation of the Departmental Promotion Committee. Their promotion order also indicated the vacancies of the year against which they were promoted.

Claim of the petitioners is based on the fact that while they were already holding the post of Asstt. Engineer, the Government by its order dated 16.11.1988 upgraded 92

posts of Junior Engineer and therefore their promotion although initially made on urgent temporary basis should be at least from 16.11.1988 taken to have been made in substantive capacity. Argument is that the Government by order dated 16.11.1988 conveyed its sanction for up-gradation of 81 posts of Junior Engineer (Civil) to the status of Executive Engineer in pay scale of Rs.1720-3300. Since all the petitioners were already working as Asstt. Engineer on urgent temporary basis and as such they were senior enough so as to find bearth in first 81 posts which were upgraded under the order dated 16.11.1988. The respondents have published a seniority list of the Junior Engineers by their orders dated 5.2.1998 working in the department as on 1st April, 1997 in which the petitioners were shown to have been appointed by promotion against the vacancies of the year 1992-93, 1994-95 and 1995-96. In doing so, they have illegally ignored the fact that petitioners were already promoted way back in the year 1987 even prior to the year 1987 and ought to have been

assigned seniority with effect from 16.11.1988. With these pleadings the present writ petition has been filed with the prayers extracted above.

The respondents have contested the present writ petition by filing comprehensive reply thereto. Preliminary objection has been raised that the present writ petition deserves to be dismissed as it suffers from delay and laches. In fact, according to the petitioners themselves, cause of action accrued to them in the year 1988 whereas the present writ petition has been filed in the year 2003. Even as per their own case they were accorded promotion in the year 1998 on urgent temporary basis under Rule 27 of the Rules of 1954. Even if 81 posts became available to the department by way of up-gradation, recruitment to those posts could be made only in accordance with provisions contained in Rule of 1954. Source of recruitment in the rules then in vogue was 50% by direct recruitment and 50% by promotion. Posts of direct recruitment have already

been filled up through Rajasthan Public Service Commission upto the quota of the year 1991-92. The petitioners were not reverted and they were allowed to continue to hold the posts on promotion only because of the availability of the upgraded posts. In course of time however they were granted regular promotion on the recommendation of the DPC against the vacancies of the year 1992-93 to 95-96. There was therefore no question for treating promotion of the petitioners made on adhoc urgent temporary basis in the year 1987 as substantive promotion just because certain posts become available by up-gradation at a later stage.

I have heard learned counsel for the parties and perused the record.

Shri Sangeet Lodha, learned counsel for the petitioner argued that upgraded posts became available by virtue of the fact that the posts of Junior Engineers were as such upgraded. There was no separate exercise of abolition of

the posts of Junior Engineers and creation of the posts of Asstt Engineer. Those who have held these posts should therefore have a preferential claim for promotion against such posts. He argued that such posts could not be further divided into ratio of 50%:50% for promotion and direct recruitment. Shri Lodha argued that there was no change in circumstances when the posts were upgraded. Since the petitioner were already promoted, availability of posts should be taken as a factor to determine their entitlement to claim substantive promotion at least from the date such posts became available on 16.11.1988. Shri Lodha referred to order dated 16.11.1988 according to which 81 posts of Junior Engineer (Civil) were created consequent upon up-gradation of a corresponding number of posts of Junior Engineers. He argued that the petitioners should be assigned seniority from the year 1988-89 by treating their promotion as substantive from the said date. While referring to rule 7AA of the Rules of 1954, Shri Lodha argued that rule making authority itself has recognized the right of those

promoted as Asstt. Engineer against the posts which have become available by way of up-gradation of the posts of Junior Engineer. He therefore prayed that writ petition may be allowed.

On the other hand, Shri Rameshwar Dave, learned Dy. Government Advocate argued that appointment of the petitioners was made only on urgent temporary basis and this fact was fully well known to them. In fact their urgent temporary appointment continued for a long period, which would have otherwise come to an end but for availability of 81 upgrade posts. Upgraded posts were required to be apportioned amongst promotees and direct recruits in the ratio of 50%:50% as provided in the Rules of 1954. There is no legal basis for claim of the petitioners for grant of seniority from the date of up-gradation of the post. He therefore prayed that writ petition may be dismissed.

I have given my thoughtful consideration to the

arguments advanced by learned counsel for the parties and perused the record.

It is an admitted fact that the petitioners were initially promoted on urgent temporary basis. Their subsequent regular promotion was based on the recommendation of DPC against the vacancies of the years from 1992 to 1996, the promotion granted to the petitioners by rule 27 was in the nature of urgent temporary appointment on ad hoc basis. What in fact the petitioners are claiming is that such appointment should be treated as regular one. Their argument is that since the creation of 81 posts of Asstt. Engineers was result of up-gradation of a corresponding number of posts from the cadre of Junior Engineer, the post of Junior Engineer being 100% by direct recruitment, there should be no appointment by way of direct recruitment against 81 upgraded post. In other words, what they are claiming is that all 81 upgraded posts should come to the quota of promotion as a lot. That being the position,

this would result in eventual availability of posts from 16th Nov., 1988 for regular promotion of the petitioners and they may accordingly be treated to have been substantively promoted from that date.

This is indeed too tall a claim to accept but one should really appreciate the ingenuity of the argument coined to substantiate an otherwise unfounded claim. Reference to rule 7AA of the rules of 1954 is wholly misconceived because this rule was introduced in the Rules of 1954 vide notification dated 9.12.1996 and would obviously be prospective in nature. For the facility of reference rule 7AA is reproduced in extenso:

> "**Rule 7AA. One time promotion to the upgraded post of Assistant Engineer (Civil/Mechanical/Electrical)-**
> Notwithstanding anything to the contrary contained in these rules or the schedule, upon the upgradation of the existing posts of Junior Engineer (Civil/Mech./Elect.) to the posts of Assistant Engineer (Civil/Mech./Elect.), the posts of Assistant Engineers so upgraded shall be filled 100% by promotion in accordance with the procedure and quota laid down in these rules."

It would be evidently clear from the rule 7AA that a provision was made within the rules of 1954 itself and it started with non-obstante clause, thus, in effect giving it an over riding effect over the provisions relating to apportionment of vacancies in the ratio of 50%:50%. The post of Asstt. Engineer appears at no.1 under the caption of Junior post in the Schedule – I appended to Rules of 1954. Method of recruitment with percentage in column thereof is indicated as 50% by direct recruitment and 50% by promotion. Quota of promotion has been further sub divided into two categories namely 30% by promotion from Junior Engineer (Diploma holder) and 20% by promotion from Junior Engineer (Degree Holder). When 81 posts of Asstt. Engineers became available with the respondents by order dated 16.11.1988 no rule such as rule 7AA was available in the rules. The petitioners are now seeking a writ of mandamus requiring the respondents to act contrary to the rules. Such a writ of mandamus cannot be issued. Even otherwise the respondents cannot be required to treat

urgent temporary and ad hoc promotion of the petitioners made in the year 1987 by recourse to rule 27 of the Rules of 1954 relating to urgent temporary appointment as substantive. Law on the question is well settled that the period of ad hoc service tendered by any government servant cannot be counted for the purpose of seniority. If any authority for this proposition of law were needed, the same is available in the judgments of the Hon'ble Surpeme Court in Sanjay K Sinha-II & Ors Vs. State of Bihar & Ors (2004) 10 SCC 734 and State of Punjab & Ors Vs. Gurdeep Kaur Uppal & Ors (2003) 11 SCC 732.

In view of what has been discussed above, I do not find any merit in the present writ petition and the same is therefore dismissed with no order as to costs.

(MOHAMMAD RAFIQ), J.

c.p.goyal/-